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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOLICOEUR FURNITURE CO.
and JAMES ZAGRODNY,
Petitioners,
v.
CITY OF WOONSOCKET, RHODE ISLAND,
CHARLES C. BALDELLI and N. DAVID BOULEY,
Respondents.

On Petition for a Writ of Certiorari to the Rhode Island Supreme Court

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

During the past four months, no fewer than four petitions for certiorari have been filed with his Court seeking clarification of the substantive due process standard applicable to arbitrary government action that deprives a citizen of the ownership or use of his land. *See Bensalem Township v. Blanche Road Corp.*, No. 95-249 (filed Aug. 11, 1995); *Zoning Board of Adjustment for the Township of West Amwell v. BeBlasio*, No. 95-163 (filed Aug. 26, 1995); *Freeman v. Town of West Baylston*, No. 95-195 (filed July 24, 1995). Each of these petitions identified the same conflict as petitioner Jolicoeur in the instant petition: the Third Circuit applies an "arbitrariness" test to decide substantive due process claims in the

land use context, while the Rhode Island Supreme Court and the First Circuit apply a stricter "shocks the conscience" test. The frequent recurrence of this issue demonstrates the need for plenary review. Indeed, the Attorneys General of 13 States filed an amicus brief in *DeBlasio* urging the Court to grant review.[1]

The results in these cases make clear that this conflict cannot be brushed aside as a mater of mere semantics. In *DeBlasio, Bensalem Township* and earlier Third Circuit decisions such as *Bellow v. Walker,* 840 F.2d 1124 (3d Cir.), *cert. denied,* 488 U.S. 851 (1988), substantive due process claims proceeded despite the absence of any evidence, or even allegation, that the conduct at issue was so extreme as to shock the conscience. In contrast, the First Circuit and other courts applying the "shocks the conscience" standard have never permitted a substantive due process claim to go forward in the land use context. As demonstrated, the choice of standards was determinative here. (Petition for Certiorari at 14-15.)

The courts of appeals themselves have underscored the need for guidance on the proper standard to apply in substantive due process challenges to land use determinations. *See DeBlasio,* 53 F.3d at 598; *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1217 (6th Cir. 1992) (noting "remarkable" lack of uniformity in standards governing substantive due process land use claims). Thus, respondents are simply wrong in asserting that the law is settled and clear on this question. Indeed, the decisions of this Court on which respondents rely predate the court of appeals decisions calling for guidance. Decisions of this Court involving land use regulation have never applied a "shocks the conscience" test. *See Dolan v. City of Tigard,* 114 S. Ct. 2309, 2320 n.8 (1994)

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[1] If certiorari is granted in *DeBlasio* or any of the other pending petitions noted in the text, the instant case should be held pending disposition of the granted case.

(where city makes "adjudicative decision to condition petitioner's application for building permit on an individual parcel . . . the burden properly rests on the City" to show land use regulation is not an arbitrary restriction); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (land-use regulations violate the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare"); *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928). The decisions respondents cite are of limited utility because none involved alleged deprivations of real property. Real property cases simply do not present any of the difficult issues, identified by respondents, of deciding to recognize new and previously unacknowledged fundamental rights.

With respect to Jolicoeur's just compensation claim, respondents make no effort to defend the Rhode Island Supreme Court's insupportable holding. There is no doubt that the Rhode Island Supreme Court is both wrong and in conflict with numerous other courts in holding that Fifth Amendment takings claims may not be brought pursuant to 42 U.S.C. § 1983. Instead, respondents argue that Jolicoeur was fully compensated for the taking of his property because, although it was denied prejudgment interest for almost two and a half years, during the taking, Jolicoeur was allegedly at fault for not submitting satisfactory building plans until late 1989. However, from August 1987 until the court order in 1989 requiring them to review Jolicoeur's plans, respondents refused to consider numerous sets of plans tendered by petitioners—at one point physically throwing a set of plans out of the planning department office. In any event, whether the state breach of contract remedy provided full compensation to Jolicoeur and, if so, whether it precludes a just compensation claim, was never considered by the Rhode Island Supreme Court. That issue could easily be resolved on remand after a decision by this Court on

the question whether a Just Compensation claim may be brought in state court pursuant to Section 1983. Respondents' arguments do not justify leaving the Rhode Island Supreme Court's patently wrong ruling on that question undisturbed. As matters now stand, Rhode Island's citizens may not invoke Section 1983 to bring Fifth Amendment takings claims in state court.

Respectfully submitted,

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